94

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MILO D. BURROUGHS, Petitioner, pro se

vs.

DEPARTMENT OF THE ARMY, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEAL FOR THE FEDERAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

Milo D. Burroughs

11244 Aero Ln SE

Yelm. WA 98597

360-458-8775

QUESTIONS PRESENTED

1. Did the US Court of Appeals for the Federal Circuit refusal to adjudicate petitioner's veterans preference rights(VPR) violate his 5th Amendment Rights?

2. Was the decision of the federal appeals court not to adjudicate petitioner's VPR contrary to the Supreme Courts decision in *Arnett v. Kennedy*?

3. Is the petitioner entitled to adjudication of his VPR under the Veterans Preference Act of 1944?

4. Did reviewing authorities fail to address petitioner's due process rights in violation of 5 U.S.C. 706?

5. Did reviewing authorities act in a positive manner to honor "the broadly and liberally construed" interpretation as applied to 38 U.S.C. 4301-4334 when considering petitioners arguments?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF THE CASE

VETERANS PREFERENCE RIGHTS (VPR)

The court of appeals for the federal circuit stated in the first paragraph of its opinion, *"He was one of 17 candidates who were referred to a three member screening committee."* (APP·B) The court declined to identify the fact, that the petitioner, was the only veteran of 17 candidates and this lack of veteran's recognition, support and avoidance of veteran's preference rights(VPR) issues is no accident and goes to the crux of the matters at issue.(APP·J) The agency and every reviewing authority have refused to recognize or adjudicate the petitioner's VPR impact on the employment practices at hand.

As a WW II vet, the petitioner's VPR were established in World War II under the Civil Service Commission's(CSC) Veterans' Preference Act(VPA) of 1944 (Right of appeal. Sec. 14 "...shall have the right of appeal to the Civil Service Commission from an adverse decision...") (APP·E) and he is entitled to adjudication of his VPR under that act, not withstanding the Veterans Employment Opportunities Act of 1998(VEOA). (APP·F)

When referring to "due process" involving the review rights prescribed by the Veterans Preference Act of 1944 the Supreme Court in *Arnett v. Kennedy* (1974), recognized among other things, Kennedy's entitlement to a proceeding where the decision will contain findings of fact and conclusions of law with

regard to all controverted issues, together with an analysis indicating the manner in which the controversies were resolved.

The present adverse action opinions fail in substantial ways to provide all of these rudimentary elements required for a due process hearing. It therefore fails to meet the requirements of due process secured by the Fifth Amendment to the Constitution of the United States, and is hence, invalid, null and void.

The court found that the review rights prescribed by the Veterans Preference Act of 1944 were central to the constitutionality of the civil service system.

The CSC and court review process would have ruled on petitioner's claim without fragmenting it. With all due respect fragmentation and separation by the agency and reviewing authorities is not adjudication, is a way of avoiding the issues and is contrary to the federal circuit courts obligations at 5 U.S.C. 706 (APP-G);

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Emphasis added.

Unfortunately for the petitioner this first paragraph was a precursor of the federal courts decision and set the tone for the entire decision. The court opined in so many words that since the petitioner did not invoke VEOA he

was not entitled to adjudication of his veteran's preference rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) (APP-H).

> "38 U.S.C. 4311(a) A person who...has performed...service in a uniformed service shall not be denied...any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
>
> (c) An employer shall be considered to have engaged in actions prohibited-
> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." Emphasis added.

Although challenged by the petitioner, the record is absent any proof by the agency(or the reviewing authorities) that the action taken would have been taken in the absence of his military service. (APP-I)

This denial of "broadly and liberally construed" interpretation of vets rulings constitutes a failure of minimum due process by refusing to determine if prejudicial error existed contrary to 5 U.S.C. 706:

> "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." Emphasis added.

There is nothing in the USERRA statues prohibiting the federal court from exercising its inherent adjudication powers reference petitioner's VPR:

> 20 CFR Part 1002.314 "A court may use its full equity powers, including the issuance of..." Federal Register Vol. 70, No.242, December19, 2005, 75313 (APP-H)

The USERRA is a remedial statute, and as such, it should be broadly and liberally construed in favor of those whom it was intended to protect.

The federal appeals court stated in their opinion (APP·B);

> *"In sum, with regard to the only issue before the Board·whether Mr. Burroughs showed that the agency discriminated against him based on his prior military service·the administrative judge's determination is supported by substantial evidence."*

The obvious problem with this sum is, how could the petitioner gather "*substantial evidence*" if all reviewing authorities, including the federal appeals court refused to adjudicate his claim of VPR discrimination in reference to his "*military service*"? This is a doubly significant factor when those opposing VPR have a mindset, and this court had such a mindset(see par 1), to avoid VPR matters all together.

It is an uncontested fact that the petitioner's VPR was an interwoven and an inseparable part of the petitioner's USERRA proof of prior military service/status and motivation argument. The conclusion that VPR need not be adjudicated by the federal appeals court in arriving at its finding that petitioner's prior military service/status was not at least a motivating or substantial factor in the agencies actions, is beyond logic.

REASONS FOR GRANTING THE PETITION

Because of the importance of the VPR issue impacting millions of veterans and the conflict among the Circuits and the various MSPB, AJ's in reference to VPR. In sum they want no part of adjudicating veterans preference rights!

"Move Out" is a common command given (even today) by a Platoon Sergeant to move forward and engage the enemy. A Soldier understands clearly and distinctly that the Sergeant's order is legal and backed by law. He understands that he is being called upon to give his life if necessary in the defense of our great nation and he does so without hesitation.

The petitioner and millions of veterans are as a minimum, entitled to that same clarity involving their Veterans Preference Rights when applying for federal jobs.

But, as in the petitioner's case we are denied those rights on a regular and reoccurring basis by agencies subjecting their applications to prohibited, circumventing employment practices and reviewing authorities bent on backlog reducing strategies.

It has been more than 30 years since this court has examined this issue in detail and given the continuing sacrifices of our soldiers, the administrative

erosion of law/statue that has taken place at OPM and the legislative prone AJ's, an in-depth review by the court of last resort is appropriate.

SUM

Veterans are being denied their VPR every day when applying for civil service jobs. The agencies and reviewing authorities have refused to acknowledge and actively support veterans preference rights. The agencies do this because it interferes with their perceived right to hire who they want without restrictions. The reviewing authorities do this because they do not want to adjudicate the written statues granting VPR and fragmentation and separation of the issues is an easy way out without being held accountable for their lack of positive support. (APP-J) subject matter white paper.

The cement that binds these two forces together is a tacit, if not an absolute disregard for VPR. To this end the veteran doesn't stand a chance and in the end looses out, please help us?

In essences the soldier who lays his life on line is not getting his just(justice) due. This country's most precious assets, the soldiers who guarantee the freedoms we all enjoy are being denied due process. The court of last resort is the soldier's last hope. Rendering an appropriate and specific remedy to rectify such circumstances as described herein would be recognition long deserved and the award intended by the people, for the soldiers sacrifices.

REMEDY

The petitioner request a ruling from the court adjudicating his Veterans Preference Rights as cited and an opinion of when, where, how and to what extent should the "broadly and liberally construed" command be applied in the recruiting, ranking, selection, employment and adjudication process of veterans, and the appropriate sanctions for failing to do so.

Or such other relief this court may deem appropriate.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Date: 9 JAN 08

INDEX TO APPENDICIES

APPENDIX A Petition for rehearing, US Court of Appeals for the Federal Circuit. Denied: December 10, 2007

APPENDIX B. Opinion, US Court of Appeals for the Federal Circuit. Decided November 9, 2007

APPENDIX C. Petition for review MSPB Board, June 19, 2007, DA-3443-0648-I-1

APPENDIX D. Initial Decision MSPB, December 26, 2006, DA-3443-0648-I-1

APPENDIX E. Veterans Preference Act of 1944

APPENDIX F. VEOA Act 1998

APPENDIX G. 5 U.S.C. 706

APPENDIX H. 38 U.S.C. 4311

APPENDIX I. Case history

APPENDIX J. White paper Testimony of Joseph C. Sharp, Jr. March 10, 2006

RECVD
DEC 1-1 07

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-3276

MILO D. BURROUGHS,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

ORDER

A

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Michel, Chief Judge, Bryson, Circuit Judge, and Fogel, District Judge.*

A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 2, 2008.

FOR THE COURT,

Jan Horbaly 12/10

Jan Horbaly
Clerk

Dated: 12/10/2007

cc: Milo D. Burroughs
David A. Harrington

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

DEC 10 2007

JAN HORBALY
CLERK

BURROUGHS V ARMY, 2007-3276
(MSPB - DA3443060648-I-1)

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* Honorable Jeremy Fogel, District Judge, United States District Court for the Northern District of California, sitting by designation.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3276

MILO D. BURROUGHS,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

Milo D. Burroughs, of Yelm, Washington, pro se.

David A. Harrington, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. On the brief were Peter D. Keisler, Acting Attorney General, Jeanne E. Davidson, Director, and Kathryn A. Bleecker, Assistant Director.

Appealed from: United States Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3276

MILO D. BURROUGHS,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

DECIDED: November 9, 2007

Before MICHEL, Chief Judge, BRYSON, Circuit Judge, and FOGEL, District Judge.

PER CURIAM.

DECISION

Milo D. Burroughs appeals from a decision of the Merit Systems Protection Board, Docket No. DA-3443-06-0648-I-1, in which the Board rejected Mr. Burroughs' claim that his employer, the Department of the Army, violated the anti-discrimination

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Honorable Jeremy Fogel, District Judge, United States District Court for the Northern District of California, sitting by designation.

R

provision of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4311. We affirm.

BACKGROUND

Mr. Burroughs, a decorated military veteran, applied for the position of Lead Aerospace Engineer at the Corpus Christi, Texas, Army Depot in 2004. He was one of 17 candidates who were referred to a three-member screening committee. The committee was charged with the responsibility of reviewing the applications and ranking the candidates. After completing the ranking, the committee referred 11 of the 17 candidates to a selection panel for interview and further consideration. Mr. Burroughs was not one of the 11 who were referred to the selection panel.

Mr. Burroughs filed a complaint alleging that he had been discriminated against based on his age (he was 76 years old at the time). An administrative judge with the Equal Employment Opportunity Commission found no age discrimination and entered judgment for the agency.

Following the rejection of his age discrimination complaint, Mr. Burroughs filed this action under USERRA with the Merit Systems Protection Board, contending that he had been discriminated against because of his prior military service. The administrative judge who was assigned to the case conducted an evidentiary hearing by videoconference at which Mr. Burroughs and all three members of the screening committee testified. Following the hearing, the administrative judge entered an order denying Mr. Burroughs' claim.

The administrative judge found that the three members of the screening committee "each credibly testified that the appellant's veteran status was not a factor

that they considered in determining whether to include him among the applicants selected for further consideration." The administrative judge recited in detail the explanations given by each committee member for his or her assessment of Mr. Burroughs' qualifications for the position and concluded that there was no evidence that their accounts "do not accurately reflect the panel members' assessment of the appellant's qualifications for the subject vacancy." The administrative judge concluded that Mr. Burroughs "failed to show that it is more likely true than not that, because of his service in the uniformed services, the agency did not refer him for an interview for the position of Lead Aerospace Engineer." Accordingly, the administrative judge found no violation of USERRA.

When the full Board denied Mr. Burroughs' petition for review, the administrative judge's initial decision became the final decision of the Board. Mr. Burroughs now petitions for review by this court.

DISCUSSION

Mr. Burroughs plainly feels that his application for the position with the Department of the Army was not given fair consideration, and that if it had been, he would have been selected. However, it is Mr. Burroughs' burden to show not simply that the agency improperly failed to select him for the position, but that its failure to do so was attributable to discrimination against him because of his status as a veteran. After an evidentiary hearing, the Board's administrative judge concluded that Mr. Burroughs had not proved discrimination based on prior military service. We are satisfied that the Board's conclusion is supported by substantial evidence and therefore must be upheld. Thus, although Mr. Burroughs points to various aspects of the

selection process that he considers to have been flawed, he has failed to show that the flaws in the process were in any way caused by discrimination based on his status as a veteran, which was the only issue before the Board in this USERRA appeal and is the only issue before us.

Mr. Burroughs asserts that the selection process was flawed in several respects. In particular, he contends, first, that the screening committee members made errors in the way they evaluated his application and, second, that they effectively denied him the benefits of the veterans' preference to which he was entitled.

As to whether the committee members committed errors in evaluating his application, he is not entitled to relief simply upon showing that the selection process was flawed. Even if he could show that he was the best candidate and should have been selected but for evaluation mistakes made by the committee, his claim under USERRA would not succeed unless he could show that those errors were motivated by animus against him based on his prior military service. USERRA ensures, inter alia, that an employer will not discriminate against an applicant "on the basis of . . . performance of [military] service." 38 U.S.C. § 4311(a). That is, a veteran is entitled to relief under USERRA if the veteran can show that his military service was "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such [service]." Id. § 4311(c)(1). The key element of a claim under USERRA thus is discrimination on the basis of military service; it is not enough to show simply that the claimant is a veteran and should have been selected for a particular position but was not. To be sure, the prohibited discrimination can be proved by circumstantial evidence. Therefore, evidence such as the failure to select a

veteran who was plainly qualified may help support a claim of discrimination, but it is not by itself sufficient to satisfy USERRA. See Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1013-14 (Fed. Cir. 2001).

In this case, the Board's administrative judge heard testimony from Mr. Burroughs and from all three members of the screening committee, as well as from an agency human relations officer. Based on that evidence, the administrative judge found that the committee members' explanations for their decision not to forward Mr. Burroughs' name to the selection committee were credible; for that reason, the administrative judge rejected Mr. Burroughs' assertions that the selection committee's true motivation was to discriminate against Mr. Burroughs based on his status as a veteran and that his prior military service was the true reason he was not hired. In making that determination, the administrative judge was properly focused on the legal issue raised by Mr. Burroughs' USERRA appeal. Because there is nothing in the record to suggest anti-veteran animus on the part of the screening committee in particular, and the agency as a whole—other than the fact that Mr. Burroughs was not referred to the selection committee and ultimately selected—we hold that the administrative judge's finding that Mr. Burroughs failed to prove a violation of USERRA is supported by substantial evidence.

Mr. Burroughs' second argument is that the selection process effectively denied him the benefit of the veterans' preference to which he was entitled. The problem with that argument is that claims regarding the improper crediting of the veterans' preference are properly raised under the Veterans Employment Opportunities Act ("VEOA"), 5 U.S.C. § 3330a. Such claims are not within the reach of USERRA, except to the extent

that the denial of veterans' preference credit to which an applicant is entitled may be some evidence of anti-veteran animus. Except in that respect, USERRA is not directed at enforcing the rights of veterans to be given preference over non-veterans. See Gaston v. Peace Corps, 100 M.S.P.R. 411, 413 (2005) ("USERRA does not provide that veterans will be treated better than non-veterans."); Fahrenbacher v. Dep't of the Navy, 85 M.S.P.R. 500, 510 (2000) (stating, in response to the argument that the failure to afford the appellants veterans' preference shows discrimination: "To establish discrimination, the appellants must show that they were treated more harshly than non-veterans. The fact that they were not treated better than non-veterans does not show discrimination."), aff'd sub nom. Sheehan v. Dep't of the Navy, 240 F.3d 1009 (Fed. Cir. 2001).

In this case, Mr. Burroughs declined to pursue a claim under the VEOA, which would have required him to seek an administrative remedy from the Department of Labor before appealing to the Board. The administrative judge specifically inquired whether Mr. Burroughs intended to pursue his rights under the VEOA, noting that his appeal might fall under both the VEOA and USERRA. In response, Mr. Burroughs stated that he had not filed a complaint with the Department of Labor and had "no intention of doing so." For purposes of this proceeding, he therefore clearly waived his rights under the VEOA. Accordingly, the asserted failure of the agency to accord him his veterans' preference rights is relevant only to the extent that it can be deemed to provide evidentiary support for his claim that the agency was motivated by his prior military service to deny him the position he sought. Because the administrative judge concluded, based on credible testimony from all three members of the screening

committee, that they made their decision based on the merits of the applicants, as they perceived them to be, the administrative judge rejected the claim that the three selection committee members testified falsely and instead sought to disqualify Mr. Burroughs from the position because of his prior military service. In the absence of any other evidence suggesting anti-veteran animus, the claim that the selection process effectively denied Mr. Burroughs the benefit of the veterans' preference is not enough to overcome the administrative judge's finding, based on the entire record before her, that the decision not to select Mr. Burroughs was not motivated by anti-veteran bias.

Mr. Burroughs also raises objections to various aspects of the procedure employed by the administrative judge in conducting the hearing on his claim. He objects to the fact that the hearing was held by videoconference rather than in person and that one witness was allowed to testify by telephone. Given the heavy workload of the Board's administrative judges and the fact that the administrative judges are often stationed long distances from employment sites and places that are convenient to parties and witnesses, the Board has approved the use of video-conferencing, Koehler v. Dep't of Air Force, 99 M.S.P.R. 82 (2005), a practice that we think is acceptable absent a showing that it resulted in specific unfairness in a particular case. As to the witness who apparently testified by telephone, Mr. Burroughs has not made any showing that he was prejudiced by the administrative judge's decision to proceed in that manner with respect to that witness, who was apparently otherwise unavailable.

Mr. Burroughs also objects to the administrative judge's refusal to permit him to call other witnesses, including the chief of an Army helicopter maintenance operation, who could testify about the work involved in the position in question, and two witnesses

who, according to Mr. Burroughs, would have enabled him to show that the selection process used in this case was "an invalid employment practice." Mr. Burroughs' arguments here appear to be predicated, however, on his view that the subject of the appeal before the Board was whether he was qualified for the position and should have been selected, rather than whether the agency discriminated against him based on his status as a veteran. To the extent that he has indicated the subject matter about which those witnesses would have testified, it is clear that their testimony would have been of only the most marginal potential relevance to the discrimination issue, which the administrative judge properly held to be the only issue presented for decision in the USERRA appeal.

In sum, with regard to the only issue before the Board—whether Mr. Burroughs showed that the agency discriminated against him based on his prior military service—the administrative judge's determination is supported by substantial evidence, and Mr. Burroughs has not shown that he was prejudiced in his effort to make the requisite showing by any of the procedures employed by the administrative judge prior to or in the course of the Board's hearing.

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
DA-3443-06-0648-I-1

DEPARTMENT OF THE ARMY,
Agency.

DATE: June 19, 2007

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

MILO D. BURROUGHS,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DA-3443-06-0648-I-1

DATE: December 26, 2006

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

BEFORE
Donna M. Edwards
Administrative Judge

INITIAL DECISION

On September 7, 2006, Milo D. Burroughs filed this appeal and alleged that the Department of the Army violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat. 3149) (codified at 38 U.S.C. § 4301, *et. seq.*), when, based upon his military service, it did not refer him to a selection panel for consideration for one of four vacancies. The Board has jurisdiction over the appeal pursuant to 38 U.S.C. § 4324(b). At the appellant's request, a hearing was held.

Based on the following analysis and findings, the appellant's request for corrective action is DENIED.

D

ANALYSIS AND FINDINGS

The appellant was an applicant for the position of Lead Aerospace Engineer, DB-0861-4. Appeal File (AF) Tab 6 (4a) pp. 30-34. The position was announced internally on August 20, 2004, under vacancy announcement number WTAA04084358, and was announced externally on August 25, 2004, under vacancy announcement number WTAA04140397D. *Id.* The appellant, who was referred on both an internal referral as a reinstatement eligible, and on an external referral, was one of seventeen candidates referred to a three member screening panel that was convened to rate and rank the applicants. AF Tab 6(4a), pp. 8, 12-17. The panel members were Nick Hurta, Field Liason Engineer Team Leader, Aviation Missile Research Development Engineering Center (AMRDEC), Jean Grotophorst, Team Leader for Value Engineering and Life Cycle Cost Reduction Programs at the AMRDEC, and Teddie V. Stokes, Director for Chinooke Sustainment Integrated Material Management Center at the AMRDEC. *Id.* The panel referred eleven candidates to the selection panel for interview and further consideration. The appellant was not among those referred, and was not further considered in the selection process. *Id.*

On June 8, 2005, the appellant filed an age discrimination complaint regarding his non-selection. AF Tab 6(4d), p. 53. An Equal Employment Opportunity Commission Administrative Judge issued a decision on August 29, 2006, finding no discrimination. AF Tab 6(4d), pp. 62-71. The appellant then filed this timely appeal. AF Tab 1. In an addendum to his appeal the appellant alleged that, based upon his military service, the agency discriminated against him in the recruiting, ranking, rating, and selection process related to the vacancies in issue. AF Tab 3. Because it was unclear whether the appellant was asserting that the agency violated USERRA or the Veterans Employment Opportunity Act (VEOA), on October 5, 2006, I issued a Show Cause Order advising the appellant that his appeal may fall under VEOA and/or USERRA. AF Tab 7. In response to the Show Cause Order, the appellant stated that "he

[had] not filled [sic] a complaint with the Secretary of Labor and [had] no intention doing so[sic]. Appellant's intent is to file directly to the Board under USERRA. Appellant has not contacted the Secretary of Labor in reference to a VEOA appeal and does not intend to do so." AF Tab 8.

The appellant must show by preponderant evidence that his military service was a substantial or motivating factor in the agency's decision not to refer him for an interview for the position of Lead Aerospace Engineer.

Under USERRA, a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation. *See* 38 U.S.C. § 4311(a), 5 C.F.R. § 1208.2(a) (2006). An employer shall be considered to have engaged in actions prohibited under 5 C.F.R. § 1208.2(a) if the appellant's military status or obligation for service in the uniformed services is a motivating factor in one of the employer's actions identified above, unless the employer can prove that the action would have been taken in the absence of the military status or obligation. 38 U.S.C. § 4311(c); *see Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1483 (Fed. Cir. 1998).

In order to prevail on his USERRA claim, the appellant must prove by preponderant evidence[1] that, his military service was a "substantial or motivating factor" in the actions challenged. *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); 38 U.S.C. § 4311. An appellant may prove discriminatory motive or intent by either direct or circumstantial (indirect) evidence. *Sheehan* at 1013-14. If the appellant meets this burden, then the

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[1] A preponderance of evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2006).

burden shifts to the agency to rebut that claim by showing, by a preponderance of evidence, that it would have taken or not taken the same action(s) anyway, based on valid reasons. *Id.*

In support of his USERRA claim, the appellant testified that he was the only veteran in the applicant pool and he believed that was the reason why he did not get an interview. Hearing Testimony (HT).[2] He stated that the agency's discrimination against him, based on his military service, should be inferred from the agency's failure to give him credit for his five point veteran's status and from the fact that non-veterans with experience similar to his were referred for an interview. *Id.* In a written submission to the Board the appellant asserted that his qualifications for the subject position were superior to those of the other candidates. AF Tab 5, p. 6. He also argued that his referral to the rating and ranking panel on both an internal and external certificate nullified his veteran's preference and was further evidence that the agency violated USERRA. AF Tab 5, p. 5.

Linda Brown, Chief of Human Resources at the AMRDEC testified that she advised the rating panel of the procedures that they were to follow when reviewing the applicants' resumes. HT. Brown explained that the panel members were instructed to individually review the applicants' credentials against the knowledge, skills and abilities (KSAs), detailed on the crediting plan and to then develop a consensus rating for each applicant. *Id.* Brown noted that, as a part of the rating process, the panel members were expected to select a "natural break point," such that only those applicants with scores above the break point would be referred for an interview. *Id.* Brown testified that the appellant was referred to the panel on both an internal and external list of candidates and that the panel reviewed both of his applications. *Id.*

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[2] The Hearing Tapes are found at Tab 27 of Appeal File.

Linda Rinaldi, Human Resources Specialist, testified that she reviewed the resumes submitted in response to the subject vacancy announcements and stated that she spoke with the appellant to explain the selection process. HT. Rinaldi reported that the appellant was given credit for his five point veterans preference and, that as a result, he was first on the certificate of eligibles for external candidates with a rating of 105. *Id.* Rinalidi confirmed that the appellant was the only veteran in the applicant pool. *Id.* She verified that the selection that is the subject of the appeal was made from the internal referral. *Id.* Rinaldi explained that a veteran cannot be passed over when a selection is made from an external list, but that is not the case for a selection made from an internal list. *Id.* Grotophorst, Hurta, and Stokes testified at the hearing.

Grothophorst testified that she was selected as the rating panel chair and that prior to reviewing the candidates' applications, Brown instructed the panel members on the proper procedures to follow. HT. Grotophorst stated that she reviewed the appellant's credentials, as described in the resume he submitted, against the crediting plan. *Id.* She explained that she ranked him first, based solely on her own assessment, and later developed a consensus rating after discussion with the other panel members. *Id.* Grotophorst testified that the consensus rating for the appellant was five. She explained that the appellant only received a rating of five because his resume did not reflect that he had experience in the development and documentation of depot level maintenance activities. *Id.* She also noted that his resume did not reflect that he had experience working on rotor wing aircraft. *Id.* Grotophorst explained that a break point was selected between five and six points, and that the eleven candidates with scores of six or higher were referred for an interview. *Id.* She testified that she is a veteran; that she was aware of the appellant's veteran status during the rating process; and that she did not consider the appellant's military service in any manner when reviewing and rating his credentials. *Id.*

Stokes testified that he reviewed the appellant's resume against the pertinent crediting plan. He reported that the appellant received a low rating because his resume did not reflect that he had any experience working on army helicopters with respect to depot engineering repair authorizations. HT. Stokes also noted that the appellant's resume did not indicate that he had experience using technical data when crafting overhaul or repair procedures. *Id.* During cross-examination, the appellant asked Stokes why his experience at Fort Lewis did not qualify him for an interview. *Id.* Stokes responded by distinguishing the appellant's experience at Fort Lewis from the work done at the Corpus Christi Army Depot. *Id.* Stokes noted that unlike a depot facility, Fort Lewis is neither equipped nor authorized to perform the full range of repairs and maintenance work on aircraft. *Id.* He conceded that some "depot work" might be performed at Fort Lewis but indicated that such work could only be done with authorization. *Id.* Stokes explained that even though the appellant may have had some experience with "depot work," it would not have been the same as that of someone who had been employed at a depot facility. *Id.* He testified that the rating panel followed correct procedures when reviewing the appellant's resume and that the appellant was not referred for an interview because his score was too low. *Id.* Stokes admitted that he was aware that the appellant was a veteran; stated that he looks favorably upon veterans' work experience; and denied considering the appellant's military service as a basis for determining that he should not be referred for an interview. *Id.*

Hurta testified that he reviewed the appellant's resume against the crediting plan and formed the opinion that the appellant lacked experience producing depot level repair documents and that he lacked experience working on helicopters. *Id.* Hurta stated that the appellant's resume did not reflect that he had experience with rotor wing aircraft. *Id.* When asked on cross-examination why he changed

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his rating of the appellant's qualifications with respect to KSA's one and two[3] from a one to zero, Hurta explained that it was not until he participated in the group discussion about the candidates' ratings that he learned he could use a rating of zero. *Id.* He indicated that the zero rating accurately reflected his opinion of the appellant's experience with respect to KSAs one and two. *Id.* Hurta denied considering the appellant's veteran status as a factor in the rating process and denied using it as a basis on which to disqualify him for an interview. *Id.*

The appellant failed to show that his prior military service was a substantial or motivating factor in the agency's decision not to refer him for an interview for the position of Lead Aerospace Engineer.

The panel members each credibly testified that the appellant's veteran status was not a factor that they considered in determining whether his knowledge, skills and abilities with respect to the subject position qualified him for an interview. *See Hillen v. Department of the* Army, 35 M.S.P.R. 453, 458 (1987)(factors to be considered when assessing credibility). Each panel member provided straightforward testimony regarding the events in issue. There is nothing in the record to suggest that they had a reason to fabricate their testimony. Grotphorst, Stokes, and Hurta presented themselves as experienced in their respective technical fields and capable of accurately assessing the appellant's experience against the relevant crediting plan. Each panel member executed a declaration under penalty of perjury, summarizing the reasons why the appellant was not referred for an interview. During the hearing, the appellant challenged the veracity of the panel members' declarations, and asserted that similarities in the panel members' declarations suggested that they were in

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[3] KSA one refers to knowledge of aerospace engineering fundamentals and applications relating to maintenance or production of engines/drive trains/airframes. KSA two refers to ability to review, analyze, and develop aeronautical technical data. AF Tab 6(4a), p. 2.

collusion. There is no evidence that the declarations do not accurately reflect the panel members' assessment of the appellant's qualifications for the subject vacancy. Further, each panel member testified about their reasons for not referring the appellant for an interview; each panel member's testimony was consistent with the accounts that they provided in their respective declarations; and their testimony was subject to cross-examination.

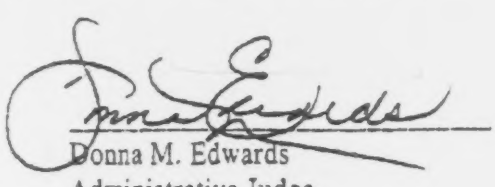
Further, the evidence of record indicates that, from among seventeen applicants considered by the panel, only eleven were referred for an interview and further consideration. AF Tab 6(4a), p. 8. In view of the fact that the appellant was the only veteran in the applicant pool, it follows that five of the six applicants who, like the appellant, were not referred for interview, were non-veterans. *Id.*

It is undisputed that the appellant is a veteran. However, the appellant did not show that, as a veteran, he was treated more harshly or differently than non-veterans in connection with the matter raised in this appeal. *See, Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, 510 (2000), *aff'd sub nom., Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001). I find, therefore, that the appellant failed to show that it is more likely true than not that, because of his service in the uniformed services, the agency did not refer him for an interview for the position of Lead Aerospace Engineer. Accordingly, I find that the appellant has failed to show any violation of USERRA in connection with the action appealed.

DECISION

The appellant's request for relief under USERRA is DENIED.

FOR THE BOARD:



Donna M. Edwards
Administrative Judge

Senate disapproval of nomination, effect.

SEC. 210. No part of any appropriation for the fiscal year 1945 contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve of the nomination of said person.

Per diem rates of allowance.

56 Stat. 359.
57 U. S. C., Supp. III, §§ 101-120.
Post, pp. 682, 729.

SEC. 211. The funds appropriated in the appropriation Acts for the fiscal year 1945 of the services mentioned in the title of the Act of June 16, 1942 (Public Law 607, Seventy-seventh Congress), shall be available for, and the heads of the executive departments concerned are authorized to prescribe, per diem rates of allowance, at rates not to exceed $7 per day, in lieu of subsistence to officers traveling on official business and away from their designated posts of duty, and to members of the services concerned (including officers, warrant officers, contract surgeons, enlisted personnel, aviation cadets, and members of the Nurse Corps) when traveling by air under competent orders and on duty without troops.

U. S. Code Annotated; Lifetime Federal Digest.

SEC. 212. No part of any appropriation contained in this or any other Act shall be used to pay in excess of $2 per volume for the current and future volumes of the United States Code Annotated or in excess of $3.25 per volume for the current or future volumes of the Lifetime Federal Digest.

Availability, after Jan. 1, 1945, of funds for certain agencies.

SEC. 213. After January 1, 1945, no part of any appropriation or fund made available by this or any other Act shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it. For the purposes of this section, any agency or instrumentality including those established by Executive order shall be deemed to have been in existence during the existence of any other agency or instrumentality, established by a prior Executive order, if the principal functions of both of such agencies or instrumentalities are substantially the same or similar. When any agency or instrumentality is or has been prevented from using appropriations by reason of this section, no part of any appropriation or fund made available by this or any other Act shall be used to pay the expenses of the performance by any other agency or instrumentality of functions which are substantially the same as or similar to the principal functions of the agency or instrumentality so prevented from using appropriations, unless the Congress has specifically authorized the expenditure of funds for performing such functions.

Short title.

SEC. 214. This Act may be cited as the "Independent Offices Appropriation Act, 1945".

Approved June 27, 1944.

[CHAPTER 287]

AN ACT

June 27, 1944
[H. R. 4125]
[Public Law 359]

To give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed.

Veterans' Preference Act of 1944.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Preference Act of 1944".

Preference in Government employment.

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in

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either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-serviceman who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

Ex-service men and women with service-connected disability.

Wives of certain disabled ex-servicemen.

Unmarried widows.

Veterans of active service in any war.

Entrance examinations.
Points added to earned ratings.

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), and (3), and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided*, That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by a concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

Custodial employees, etc.

Where experience a qualification.
Credit for time in service.

SEC. 4. In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rating where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

Credit for all valuable experience.

Waiver of certain physical requirements.

SEC. 5. In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given.

Minimum educational requirements.

No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or

professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision.

Other civil-service exemptions. 22 Stat. 403, 401. 5 U.S.C. [§ 641, 632.

SEC. 6. Preference eligibles shall not be subject to the provisions of section 9 of the Civil Service Act concerning two or more members of a family in the service, or to the provisions of section 2 of that Act concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile.

Entries on registers of eligibles.

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

Appointment procedure.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further*, That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

Filing of reasons for passing over veteran.

Determination of sufficiency of reasons.

Discontinuance of certification.

Postal Service.

Unclassified service.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing

officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

Examinations authorized in certain cases.

SEC. 10. The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 2 (1), (2), and (3) of this Act upon application for examination for any such position.

Rules and regulations.

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

Reduction in personnel, procedure.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

Armed service credits.

Preferred status in retention.

Transfer of agency functions, provision for preference employees.

Reinstatements.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

Discharge, suspension, etc.

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal

Advance notice.

Right of appeal.

appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

Findings and recommendations.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

Eligibility for recertification and reappointment.

SEC. 16. Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 7 hereof, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in sections 7 and 8 hereof.

Eligibility for reappointment after resignation.

SEC. 17. The term "Civil Service Commission" or "Commission" as used in this Act shall mean the present United States Civil Service Commission or any body or person who may by law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this Act.

Terms defined.

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Conformity of existing law.

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof.

Administration of Act.

SEC. 20. Nothing contained in this Act is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with, the advice and consent of the United States Senate: *Provided, however*, That the provisions of this Act shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938.

Nonapplication to certain positions.

Appointment of postmasters.
52 Stat. 1076.
39 U. S. C. §§ 31a, 31c; Supp. III, § 31b.

SEC. 21. If any part of this Act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

Separability.

Approved June 27, 1944.

5 U.S.C. 3312, 5 CFR Part 339.204

Preference in Competitive Examinations

Preference eligibles who are qualified for a position and achieved a passing score have 5 or 10 extra points added to their numerical ratings depending on which of the previously described categories of preference they meet. This means the highest possible rating is 110 (a disabled veteran who earns a score of 100 has 10 extra points added).

Names of eligible applicants are placed on lists, or registers of eligibles, in the order of their ratings. Competitor inventories are established from which selections will be made over a period of time and for case examining in which a register is used to fill a single position or a group of positions and is closed after the needed selection(s) is made.

For scientific and professional positions in grade General Schedule (GS) - 9 or higher, names of all qualified applicants are listed on competitor inventories in order of their ratings, augmented by veteran preference, if any.

For all other positions, the names of 10-point preference eligibles who have a compensable, service-connected disability of 10 percent or more (CP and CPS) are listed at the top of the register in the order of their ratings ahead of the names of all other eligibles. The names of other 10-point preference eligibles, 5-point preference eligibles, and other applicants are listed in order of their numerical ratings.

A preference eligible is listed ahead of a nonpreference eligible having the same final rating.

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5 U.S.C. 3309, 3313 and 5 CFR 332.401 and 337.101

Filling a Position Through the Competitive Examining Process

Announcing the Vacancy

To fill a vacancy by selection through the competitive examining process, the selecting official requests a list of eligibles from the examining office. The examining office must announce the competitive examining process through USAJOBS. OPM will notify the State employment service where the job is being filled. Subsequently, the examining office determines which applicants are qualified, rates and ranks them based on their qualifications, and issues a certificate of eligibles, which is a list of eligibles with the highest scores from the top of the appropriate register. A certificate of eligibles may be used for permanent, term, or temporary appointment.

The "Rule of Three" and Veteran Passovers

Selection must be made from the highest three eligibles on the certificate who are available for the job--the "rule of three." However, an agency may not pass over a preference eligible to select a lower ranking nonpreference eligible or nonpreference eligible with the same or lower score.

Example: If the top person on a certificate is a 10-point disabled veteran (CP or CPS) and the second and third persons are 5-point preference eligibles, the appointing authority may choose any of the three.

Example: If the top person on a certificate is a 10-point disabled veteran (CP or CPS), the second person is not a preference eligible, and the third person is a 5-point preference eligible, the appointing authority may choose either of the preference eligibles. The appointing authority may not pass over the 10-point disabled veteran to select the nonpreference eligible unless an objection has been sustained.

Disqualifications of Preference Eligibles

A preference eligible can be eliminated from consideration only if the examining office sustains the agency's objection to the preference eligible for adequate reason. These reasons, which must be recorded, include medical disqualification under 5 CFR Part 339, suitability disqualification under 5 CFR Part 731, or other reasons considered by the Office of Personnel Management (OPM) or an agency under delegated examining authority to be disqualifying.

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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SUBCHAPTER II--EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited-

> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
>
> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

§ 4312. Reemployment rights of persons who serve in the uniformed services

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

§ 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?

Yes. In an action brought in the name of the United States, for which the relief includes compensation for lost wages, benefits, or liquidated damages, the compensation must be held in a special deposit account and must be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the individual because of the Federal Government's inability to do so within a period of three years, the compensation must be converted into the Treasury of the United States as miscellaneous receipts.

§ 1002.314 May a court use its equity powers in an action or proceeding under the Act?

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed under the Act.

Signed at Washington, DC, this 8th day of December, 2005.

Charles S. Ciccolella,

Assistant Secretary for Veterans' Employment and Training.

[FR Doc. 05-23961 Filed 12-15-05; 8:45 am]

BILLING CODE 4510-79-P

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

20 CFR Part 1002

RIN 1293-AA14

Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act

AGENCY: Veterans' Employment and Training Service, Department of Labor.

ACTION: Final rule.

SUMMARY: On March 10, 2005, the Veterans' Employment and Training Service (VETS) of the Department of Labor (Department or DOL) issued an interim final rule to implement a requirement of the Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108-454 (Dec. 10, 2004). The VBIA amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) by adding a requirement that employers provide a notice of the rights, benefits, and obligations of employees and employers under USERRA. The text of this notice was included in the interim final rule, and the Department sought comment on that text. This preamble to the final rule addresses comments received during the comment period. This final rule does not affect the Department's pending proposal to implement USERRA, which was published in the Federal Register of September 20, 2004.

DATES: *Effective Date:* This rule will be effective on January 18, 2006.

FOR FURTHER INFORMATION CONTACT: For information, contact Mr. Kenan Torrans, Office of Operations and Programs, Veterans' Employment and Training Service (VETS), U.S. Department of Labor, Room S1316, 200 Constitution Ave., NW., Washington, DC 20210. Telephone: 202-693-4731 (this is not a toll-free number). Electronic mail: *torrans-william@dol.gov*. For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, Room S-1032, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202-693-5051 (this is not a toll-free number). Electronic mail: *biddle.michael@dol.gov*.

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108-454 (Dec. 10, 2004), amended several provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301-4333. In part, the VBIA imposed a new requirement, codified at 38 U.S.C. 4334, that "Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA]." Employers may provide the notice by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

The VBIA required the Secretary of Labor to make available to employers the text of the required notice not later than March 10, 2005, ninety days after the enactment of the VBIA. The publication of the interim final rule containing the text of the notice was pursuant to this Congressional mandate. Effective March 10, 2005, the VBIA requires employers to provide the notice "to persons entitled to rights and benefits" under USERRA.

The VBIA also created a demonstration project under which approximately half of the claims against Federal executive agencies arising under USERRA will be transferred by the Department of Labor to the Office of Special Counsel. Section 204(a) of the VBIA directs the "Secretary of Labor and the Office of Special Counsel [to] carry out a demonstration project under which certain claims against Federal executive agencies under [USERRA] are referred to * * * the Office of Special Counsel for assistance, including investigation and resolution of the claim as well as enforcement of rights with respect to the claim." Under this demonstration project, the Secretary of Labor transfers to OSC those cases involving Federal executive agency employees with odd-numbered social security numbers. The demonstration project began on February 8, 2005, and will end on September 30, 2007.

USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. Under USERRA, service members who leave their civilian jobs for military service can perform their duties with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals in employment because of their military service.

Over 500,000 members of the National Guard and Reserve have been mobilized since the President's declaration of a national emergency following the attacks of September 11, 2001. As service members conclude their tours of duty and return to civilian employment, it is important that employees be fully informed of their USERRA rights, benefits, and obligations. It is also important for service members to know how the Department can assist them in enforcing these rights. Providing employees with a notice of the USERRA rights, benefits, and obligations of employees and employers advances these dual objectives of informing the public about both the rights and obligations established by USERRA and about the availability of the

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

20 CFR Part 1002

[Docket No. VETS–U–04]

RIN 1293–AA09

Uniformed Services Employment and Reemployment Rights Act of 1994, As Amended

AGENCY: Veterans' Employment and Training Service, Department of Labor.

ACTION: Final rules.

SUMMARY: The Veterans' Employment and Training Service ("VETS" or "the Agency") issued proposed rules implementing the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA). This document sets forth the Agency's review of and response to comments on the proposal and any changes made in response to those comments.

Congress enacted USERRA to protect the rights of persons who voluntarily or involuntarily leave employment positions to undertake military service. USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe rules implementing the law as it applies to States, local governments, and private employers. VETS proposed rules under that authority in order to provide guidance to employers and employees concerning their rights and obligations under USERRA. The Agency invited written comments on these proposed rules, and any specific issues related to the proposal, from members of the public.

DATES: *Effective Date:* This rule will be effective on January 18, 2006.

FOR FURTHER INFORMATION CONTACT: Robert Wilson, Chief, Investigations and Compliance Division, Veterans' Employment and Training Service, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1312, Washington, DC 20210, *Wilson.Robert@dol.gov*, (202) 693–4719 (this is not a toll-free number).

For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1032, Washington, DC 20210, *Biddle.Michael@dol.gov*, (202) 693–5051 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On September 20, 2004, the Department of Labor ("the Department") issued proposed regulations to implement the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA), 38 U.S.C. 4301–4334. The Department invited written comments on the proposed regulations from interested parties. The Department also invited public comment on specific issues. The written comment period closed on November 19, 2004, and the Department has considered all timely comments received in response to the proposed regulations.

The Department received 80 timely comments from a wide variety of sources. Commenters included: a member of Congress; service members and veterans; organizations representing human resource professionals and employee benefits providers; law firms; individual employers and employer associations; individual employees and employee representatives; and members of the interested public. The comments were composed of well over 300 individual queries or concerns addressed to approximately 200 specific topics set out in the Department's notice of proposed rulemaking. While a few of the comments were generalized plaudits or individualized complaints, the great majority of comments specifically addressed issues contained in the Department's proposed rule. The Department recognizes and appreciates the value of comments, ideas, and suggestions from members of the uniformed services, employers, industry associations, labor organizations and other parties who have an interest in uniformed service members' and veterans' employment and reemployment rights and benefits.

Following the publication of the NPRM, the Department issued an interim final rule, Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Act, 70 FR 12106 (March 10, 2005), to comply with an amendment made to USERRA by the Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108–454 (Dec. 10, 2004). In part, the VBIA imposed a new requirement that "Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA]." 38 U.S.C. 4334(a). The VBIA required the Secretary of Labor to make available to employers the text of the required notice, 38 U.S.C. 4334(b), and the Department's publication of the interim final rule set forth such text as an appendix to these USERRA regulations.

II. Statutory Authority

Section 4331 of USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe regulations implementing the law as it applies to States, local governments, and private employers. 38 U.S.C. 4331(a). The Department has consulted with the Department of Defense, and issues these regulations under that authority in order to provide guidance to employers and employees concerning the rights and obligations of both under USERRA.

III. Prior Laws and Interpretation

USERRA was enacted in part to clarify prior laws relating to the reemployment rights of service members, rights that were first contained in the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. 301, *et seq.* USERRA's immediate predecessor was the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021–2027 (later recodified at 38 U.S.C. 4301–4307 and commonly referred to as the Veterans' Reemployment Rights Act "VRRA"), which was amended and recodified as USERRA.

In construing USERRA and these prior laws, courts have followed the Supreme Court's admonition that:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.

See Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946), cited in *Alabama Power Co. v. Davis*, 431 U.S. 581, 584–85 (1977); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991). The Department intends that this interpretive maxim apply with full force and effect in construing USERRA and these regulations.

This preamble also selectively refers to many other cases decided under USERRA and its predecessor statutes, to explain and illustrate the rights and benefits established under the Act. The failure to cite or refer to a particular court decision in this preamble is not intended to indicate the Department's approval or disapproval of the reasoning or holding of that case.

IV. Plain Language

The Department wrote the proposed rule in the more personal style advocated by the Presidential Memorandum on Plain Language. "Plain language" encourages the use of

HISTORY

It is uncontested that the jobs at issue involved multiple announcements, ratings and referral lists. That, the announcements, ratings and referral lists used the same qualification standard internally/externally in a competitive examination process. That the Petitioner was rated 105(best qualified and highest ranked) externally on the first referral list(a computer generated list) and zero on the third internal referral list(human generated list). That of the 17 applicants the Petitioner was the only veteran.

Facially, given the preceding uncontested facts alone one has to question the validity of either the Resumix(external) system or the agencies(internal) hiring system. The difference of course is Resumix(untouched by human prejudices), recognized Petitioners 5 point preference. The agency messaged the internal hiring procedure(preloaded with how to get around a preference veteran) to eliminate the 5 preference points aided and abetted by a multiplicity of announcements, ratings and referral lists.

Statutes granting, awarding and safeguarding veteran's preference (Title 5, Title 34, Title 38, VEOA and USERRA) do not require that a veteran submit multiple applications for the same job announcement. The relevant issue is veterans are not required by statute to file multiple job applications for the same job announcement. The intra-agency process, in actuality targets veterans as a class. We are the only discrete class of applicants that it is impossible to pass over and hire someone not of the veteran's class.

This comports with the congressional recognition that "a variety of strategies recently used by agencies that threaten veteran's preference, whether that is their intended affect or not." That veteran' preference in the workplace, "is often ignored or circumvented and that its continued viability is threatened on several fronts." H.R. Rep. No. 105-40 (1979)

The Federal Circuit on June 12, 2007 in *William D. Lynch v. Department of the Army* 2007-3114 held ..."Because Lynch was denied procedural protections he was entitled to under veteran's preference statute, we reverse and remand."

In *Dean v. CPSC* the Federal Circuit, February 28, 2007 "Mr. Dean states that this procedure deprived him of the opportunity and right to compete for

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the position, violating both the VEOA and USERRA, and is per se discriminatory." "We vacate the decision of the Board, and remand for determination of whether the Agency's practice is in accordance with law and merit principles."

PROCEDUAL DEFECTS

The hearing was not fair and impartial:

(a) Petitioner was denied the right to call witnesses to present his theory of the case.

(b) The right to an in-person hearing was denied, and then the Administrative Judge allowed telephone testimony in the video hearing.

(c) The agency was allowed to continually "switch" witnesses, effectively denying Petitioner the right to cross-examine witnesses effectively.

(d) The overall handling of the hearing process by the Administrative Judge created an aura of unfairness to this pro se Petitioner, as the Judge was continually rushing him and making disparaging remarks.

(e) Petitioner was denied a continuance, after it became evident that he was not going to be allowed to call his witnesses and present his case.

All of the above harmed Petitioner immensely, as he could not explain to the AJ why he should have been selected, and that the agency in effect, ignored the veterans preference points, to which he was entitled.

During the pre-hearing conference(PHC), November 13, 2006 the Petitioner requested that Mr. Sawyer who was Chief of an Army Helicopter Maintenance activity and the principle Administrative Officer, as a witness. Mr. Sawyer's duties included supervisory oversight and staffing of an integrated helicopter maintenance activity IAW OPM staffing regulations, an expert in both categories.

Helicopter maintenance and OPM staffing procedure/regulations were a major bone of contention between the parties and the agency was presenting 6 experts on behalf of CCAD in these subject matter areas.

Request was **DENIED** by the AJ stating "I did not approve Dean Sawyer as a witness for the appellant because he was not involved in the challenged selection process..."

In the next breath the AJ approved Ms Flores to testify for the agency even though counsel for the agency stated she "...does not have personal knowledge of the events in question." Attachment 1

The request for Mr. Sawyer was crucial to Petitioner's case. He would have been the only witness representing the Petitioner at the hearing with expertise in the subject matters at hand. The denial of this request unfairly penalized the Petitioner.

During the pre hearing conference(PHC) the Petitioner requested an in person hearing, the AJ **DENIED** Petitioner's request commenting, "I am not going to Corpus Christi" and "The Board says that I do not have to give you an in person hearing." The appellant contacted the CAJ at Dallas requesting a change of AJ's which was **DENIED** by the CAJ.

An AJ's perceived attitude is important to the Petitioner's comfort factor reference to a fair and impartial hearing. The pro se appellant did not understand these remarks as being normal and/or proper.

During the PHC the AJ **DENIED** Mr. Shamess(SO) as a witness and conditionally approved Mr. Vance(SO). At the hearing the AJ **DENIED** Mr. Vance appearance as not being a relevant witness.

Vance and Shamess collectively wrote, signed and mailed a dubious letter to the Appellant, in a strange, ambiguous, unofficial and willfully obstructive manner, for which they should answer in person.<Appellants Exhibit A, <page 12,13 & A, 10a,b,c> They were involved in an invalid employment practice which is tied to Ms Rinaldi statements. The agencies argument that only one of them need appear belies the differences in their conversations with Ms. Rinaldi's statement. Is one of them going to answer under oath for both of them? They made different selections and spoke to Ms. Rinaldi on different occasions.

At the PHC the AJ **DENIED** appellants motion for sanctions against the agency, giving an incorrect reason for doing so "...for failing to engage in settlement discussions within 35 days of the Board's Acknowledge Order." The fact is the agency and the Petitioner never engaged in settlement talks prior to the 35 day deadline reference his USERRA appeal contrary to the AJ's statement that, ..."the parties engaged in a settlement discussion"...

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Reference conference call dated 16 Nov. 06. "Your Honor in your phone call on the 16 of November 2006 you indicated, in an off hand way, that if there is a no show for the hearing that we could take a deposition, etc., at a later time, that is not a fair and impartial decision Your Honor in light of the 10 month preparation the Agency had to track and prepare the witnesses for a hearing absent a showing of good cause." No response from the AJ. The triviality with which the AJ treated this matter gave the Petitioner great trepidation as to her allegiance to equality and fair play.

Upon arrival for the hearing on December 20, 2006 at CCAD the counsel for the agency notified the Petitioner only moments before the hearing was to begin that Ms. Rinaldi would not be available to testify and Ms Flores would be replaced by Ms. Brown as an expert witness.

The Petitioner requested a conference call with the AJ. The Petitioner objected to these last minute changes, objection **DENIED**.

The AJ agreed to the agencies substitution of Ms. Brown for Ms. Flores.

Mr. Sawyer was present and available to testify, Petitioner again requested that Mr. Sawyer be permitted to testify, once again the AJ **DENIED** Petitioner's request.

The AJ **DENIED** a request by the Petitioner to postpone the hearing to a later date explaining that his preparations for the hearing were now torn asunder.

During the hearing while the Petitioner was examining a CCAD witness the AJ interrupted him to caution him to limit his questioning to matters of substance and to pickup the pace of the hearing as time was growing short. Throughout the pre hearing process the AJ said, on a number of occasions, time was an issue and that she wanted to make the 6th of January date to issue the ID. The AJ made no mention of Petitioner's "due process rights" being an issue.

In the afternoon of the hearing Ms. Rinaldi testified by telephone. Testimony by phone does not comply with the video hearing requirements where demeanor and creditability are at issue. *Koehler* was specific to a videoconference hearing, and the Board specified that "we need not, nor do we, extend this holding to telephone hearings." A witness, in this video recorded case must appear on video for examination. My rights in cross examination were curtailed.

Without explanation, the AJ stated "she would not permit recall of witnesses." A failure of due process. She dealt with this item summarily giving no latitude or leeway for a particular witness and cutoff any recall. She may have done this because she lacked control over witnesses at remote locations. All the more reason, that an in person hearing be held as requested by the Petitioner. A four location video hearing is a poor choice of a procedure where creditability is absolutely essential.

In Petitioner's response to a conference call, dated November 17, 2006 he requested, "If Your Honor does not agree with the Appellants request for an in person hearing and the requested witnesses, he respectfully requests that this motion be presented to the BOARD for a ruling before the hearing as now planned, proceeds."

DENIED per 5 C. F. R. 1201.91, December 5, 2006, stating an improper request. With all do respect the Petitioner was pro se and the USERRA process of "broadly construed" should entitle the Petitioner to a detailed explanation and an opportunity to respond before a denial issued. In this instance the Petitioner thinks that sticking to the January 6, 2007 timetable was more important than affording the Petitioner time to respond.

The Petitioner requested the "appearance order of witnesses" on October 23, 2006, "Appellants Prehearing Submissions." The AJ did not give me the courtesy of a response and turned the whole matter of witness appearance over to the CCAD counsel without limitations.

ID FAILED TO TAKE INTO ACCOUNT THE FOLLOWING FACTS

The Administrative Judge found that Petitioner had not proved that he had been denied veterans preference. Quoting from *Sheehan v. Department of the Navy*[complete citation?] the AJ said that petitioner could prove discriminatory motive or intent by circumstantial evidence, but the AJ did not allow petitioner to present evidence, or to prove it through cross-examination or review of the written record.

(a) Guidance given to the raters allowed them to give petitioner a "zero" score in the Knowledge, Skills and Abilities (KSA's), which is clearly wrong, as it changed the established crediting plan.

(b) By establishing a "natural break point" in deciding who to refer for interview, without considering veterans preference, in effect the agency denied the veterans preference, which is a benefit to which petitioner was entitled by statute.

(c) By denying the petitioner the right to call Mr. Dean Sawyer, the AJ denied the right to challenge the expertise of Mr. Hurta, a government witness, as to his knowledge of U.S. Army rotary wing operations and maintenance.

(d) Effectively, when the agency found it did not have KSA information on various applicants, it made them up itself based on application materials, which is highly irregular. An applicant's knowledge, skill or ability should be supplied by the applicant directly from an application that calls for that information directly.

SPECIFIC AS TO THE HEARING

The AJ stated under **ANALYSIS AND FINDINGS** at page 2, par 1 of the ID "The position was announced internally on August 20, 2004, under vacancy announcement number WTAA04084358, and was announced externally on August 25, 2004 under vacancy announcement number WTAA04140397D. The appellant, who was referred on both an internal referral as a reinstatement eligible, and on an external referral, was one of seventeen candidates referred to the three member screening panel that was convened to rate and rank the applicants"

This statement is incorrect. Announcement number WTAA04140397D(397D), <Appellants Exhibit A, 1c,d> was not published until August 25, 2004. Petitioner's self nomination history clearly shows that he applied internally/externally on 20/21-AUG-04 under announcement number WTAA04084358(358)<Exhibit A, 1a> which predates the publication of 397D by several days.

Appellants Self Nomination History(see authenticated attachment # 2)

WTAA04283576D	Date Received: 11-DEC-04
SCBK04145841D	Date Received: 16-SEP-04
SCEG04122443	Date Received: 03-SEP-04
WTAA04084358	Date Received: 21-AUG-04
WTAA04084358	Date Received: 20-AUG-04
SCEG04013116	Date Received: 16-AUG-04

Specifically, it also confirms that the Petitioner never applied, either externally or internally under 397D and different from the agencies evidence, not a figment of the petitioners imagination but a documented fact, because the period covered by Petitioner's resume answer sheet spanned the opening and closing dates for the jobs at issue, August 20 thru September 27, 2004.

Clearly documented in the record is the fact that Stokes and Hurta ranked the Petitioner using 397D,<A, 4d,e> the external announcement when by rule were required to use 358, (See Grotophorst<Exhibit A, 4c>) the internal announcement for the ranking process. Clear, and convincing evidence of how discriminatory, partial and mismanaged this whole process was and how little recognition and credence the AJ gave to the written record which was never challenged by the agency.

In short the Petitioner wrote his internal/external resumes in response to 358,(**not** 397D) which contained no specific KSA's. The CCAD internal ranking took place under 397D which had specific KSA's. 397D was not circulated outside of Corpus Christi Army Depot(CCAD). The CCAD selectees applied for the jobs with full knowledge of the specific KSA's.(non-vets were treated more favorably than the Petitioner) The Petitioner had no opportunity to respond to the specific KSA's in his resume relative to 397D. Although challenged in the Petitioner's brief of September 25, 2006,<Exhibit A, page 9, par 2> the agency has refused to present evidence that he applied for any job under 397D.

The AJ based her ID analysis on an incorrect premise which causes each part of her analysis and conclusions to be tainted with misconceptions, inaccuracies and suppositions rendering her analysis/conclusions unpersuasive, in short, not based on documented facts.

AS TO THE ID AND THE HEARING

The AJ based her analysis and findings on false and misleading statements by Brown, Rinaldi, Grotophorst, Stokes and Hurta. All three rankers testified that they were not trained rankers IAW the rule, and instructions from Brown just before the ranking process is not a substitute for the required training.

In the ID at page 3, par 3. The AJ stated, "Brown testified that the appellant was referred on both an internal and external list of candidates and that the panel reviewed both of his applications" This is a false statement by one of the chief architects of this wrongful and discriminatory process, the

appellant never applied for 397D, CCAD never had an application from the appellant indicating he was applying under 397D, Brown and/or CCAD have never produced such an application and the record does not contain such an application.

Rinaldi at ID page 5, par 1. The AJ stated, "Rinaldi reported that the appellant was given credit for five point veterans and that as a result, he was first on the certificate of elgibles for external candidates with a rating of 105." This is false, the appellant never applied for and the agency has never produced an application signed/submitted by the appellant for the external job under 397D. This ranking certificate was for an application under 358.

Grotophorst ID at page 5, par 2. The AJ stated, "Grotophorst stated that she reviewed the appellant's credentials, as described in the resume he submitted, against the crediting plan." That is not possible, because she ranked the appellant with two zero's and the crediting plan did not allow for zero's only a grade of 1,2 or 3 was permitted.<Appellants Exhibit A, 4a,b, the crediting plan>

"She(Grotoporst) also noted that his resume did not reflect that he had experience working on rotary wing aircraft." That's false, the appellant documented 20 years "fixed/rotary wing" experience bottom of page<Exhibit A, 5a, appellants resume> 13 years supported a "fleet of rotary and fixed wing aircraft" top of page<Exhibit A, 5b, appellants resume> Experience totaling 33 years, greater than all 3 non-veteran selectees.

Stokes ID at page 6, par 1. The AJ opined, "Stokes explained that even though the appellant may have had some experience with depot work, it would not have been the same as that of someone who had been **employed at a depot facility**." Another way of saying **only previous employees at a depot facility,** as stated by Stokes could qualify. Adverse impact and discrimination, all 3 selectees were **current depot facility employees**. There is nothing in announcement 358/397D and/or the crediting plan that states that the appellant had to be "employed at a depot facility" to meet the experience requirements for the jobs at issue! Here the AJ confirms, direct sworn evidence by Stokes that non-vets employed at depot facilities were accorded more favorable treatment by Stokes, than the appellant was. Hurta stated likewise in his testimony.

Stokes testified that the appellant "may have had some experience with depot work.", since the announcement did not require any depot work

at all, this statement by Stokes of "some experience" confirms that the appellant's depot level experience exceeds the announcements requirements.

Stokes testified here at page 6, par 1, using verbiage touching on, "working on helicopters, depot repair authorizations/documents, neither equipped nor authorized to perform the full range of repairs and maintenance work on aircraft," etc., however the appellant would remind any factfinder of Stokes expanded terms(mouthed to confuse non-technicals), to bare in mind that this same verbiage and experience requirements were used to program the Resumix computer process conducted by the DEU at Ft. Huachuca to rate the appellants qualifications.

Quoting the DEU, saying in their report to the agency(dated 6 Oct 2004), "All candidates referred have been determined to meet all of the basic qualification requirements for your(CCAD) vacancy(ies). In addition, all candidates have been evaluated against the knowledge's, skills and abilities (KSAs) contained in the evaluation tool developed by you(CCAD) and assigned numerical scores accordingly." Emphasis added. The appellant was rated superior to all selectees by the DEU.

"He(Stokes) testified that the rating panel followed correct procedures when reviewing the appellants resume and that the appellant was not referred for an interview because his score was too low." The panel passed over the appellant without awarding his 5 vets points contrary to "...there is no scoring system that is wholly neutral with respect to the impact of veteran preference points." *Meeker v MSPB,* 01-3057, 02-3042 (Fed. Cir. Feb. 20, 2003) and Interview Guidance by AMCOM 690-11<Appellants Exhibit B>, "3 OPM/DEU Interviews...Veterans cannot be passed over to select non-veterans without approval." The record contains no pass over approval. A violation of Petitioner's due process rights and direct evidence, that his military service was a "substantial or motivating factor" per *Sheehan.*

Herta at ID page 6, par 2 as stated by the AJ, "He(Hurta) indicated that the zero rating accurately reflected his opinion of the appellants experience with respect to KSAs one and two." With all due respects the crediting plan stated specifically only numbers 1,2 or 3 can be used. The accuracy of reflecting Hurta's opinion is not an issue here. Neither, the AJ, Hurta and/or the agency states any rule, law or regulation that supports the position that a zero ranking can be used. "However, the agency has failed to make reference to any law, rule or regulation that stands in support of its argument." *Patterson*

Hurta stated, at the hearing when asked by the appellant if the words in his written statement at <TAB 4a 012-013> were all his own words, yes

was his response. When pressed further by the appellant about the obvious exact verbiage in all three rankers statements Hurta insisted the words were all his own. Hurta is not believable, and his testimony does not comport with the preceding testimony only moments before by Grotophorst and Stokes, who stated that they filled out a template supplied by counsel for CCAD. Testimony such as this was discounted and not given any credence by the AJ indicating a high degree of unjustified favor for the agencies viewpoints.

The AJ stated, ID at page 7, par 2. "Each panel member provided straightforward testimony regarding the events at issue." Given the preceding this statement is not persuasive.

Reference AJ's statement ID at page 8, par 3. "However, the appellant did not show that, as a veteran, he was treated more harshly or differently than non-veterans in connection with the matter raised in this appeal" Just a couple examples;

1. Hurta refused to recognize appellants Supervisory Quality Assurance military service/experience in the Army, which required updating technical manuals, while neither, Hernandez or Isaacs(both non-vets), made references in their resumes to correcting and updating technical manuals. Disparate treatment.

2. Gotoprorst/Hurta refused to recognize 20 years of Army active duty military service/experience in helicopters and 13 years field maintenance activities at Ft. Lewis amounting to more than 33 years, superior to all 3 non-vet selectees. Adverse judgment.

AS TO THE AJ's FINDINGS

The AJ stated at ID page 8, par 2.. "In view of the fact that the appellant was the only veteran in the applicant pool, it follows that five of the six applicants who like the appellant, were not referred for interview, were non veterans." This rational is not coherent, because it does not identify the fact that the agency refused to recognize in this process, appellants 5 vet preference points, documented in the record and contrary to;

Federal Register, OPM, March 11, 1999, IV 2, *Description of Examining Process*, "For engineering/scientific and professional positions at the equivalent of GS–9 and above, candidates will be referred by quality

groups in the order of the numerical ratings, including any veterans' preference points." "...there is no scoring system that is wholly neutral with respect to the impact of veteran preference points." *Meeker v MSPB*, 01-3057, 02-3042 (Fed. Cir. Feb. 20, 2003)

SUM

Under *Sheehan* Petitioner has shown that his military service was a motivating factor in the action challenged and he has shown that he is better qualified then at least one of the selectees for the jobs at issue.

In *Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F3d 11 (1st Cir: 2007) "We agree. The language of the statute and the legislative history make clear that the employee need only show that military service was "a motivating factor" in order to prove liability,..." Note the Courts underlining of "a" an emphasis on the singular, one motivating factor meets the pretext threshold. "Therefore, we hold that "in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the [employer] action, upon which the [employer] must prove, by a preponderance of evidence, that the action would have been taken despite the protected status." Sheehan, 240 F.3d at 1014." Reversed

The agency has failed to prove by a preponderance of evidence that the action would have been taken despite the Petitioner's protected status.

The record as a whole, documents that CCAD discovered after the jobs were advertised on 20-AUG-04 under announcement WTAA04084538 that it lacked specific KSA requirements. CCAD conjured up 397D as the external announcement. CCAD's intent all along was to hire depot facility employees(see Stokes/Hurta's preceding testimony) and 358 was too non-specific in Depot matters/technical language and could impede the selection of Depot applicants. The only fly in the ointment is that the appellant, the only vet applicant applied under 358 before the agency could make the switch, the agency treated non-vets more favorably and direct evidence that his military service was a "substantial or motivating factor" per *Sheehan*.

THE MSPB DECISION WAS WRONG

In the initial decision, the Administrative Judge was aware of *Sheehan, supra,* but did not follow it. Direct evidence of intent to deny the veterans

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preference would be extremely rare, and so the MSPB and courts recognize the need to use circumstantial evidence. Unfortunately, the AJ would not allow presentation or consideration of such evidence.

As in *Patterson v. OPM,* PH-3443-03-0223-I-2 (December 4, 2003), the agency decision is not in accordance with the veterans preference statute, because petitioner was not allowed his five points **throughout the agency hiring and rating process.** The veterans preference does not apply just at the beginning and end of the process; it applies throughout the process.

1. Appellant was denied a benefit of employment contrary to 38 U.S.C. 4311;

"The appellant's evidence supports a finding that disparate motive based on the appellant's military status may be inferred from the agency's disparate treatment of applicants...The current state of the record thus allows the inference that the selecting officials eliminated all applicants with...military service from the interview process."

"The court held that discriminatory motivation under USERRA may, be reasonably inferred from a variety of factors, including disparate treatment of certain employees compared to other employees with similar work records. *Id.* Accordingly, we find that the appellant made an initial preponderant-evidence showing that military status was at least a motivating or substantial factor in the agency's selection process. We have considered the agency's submissions, and find that, based on the current record, the agency did not meet its burden of proof under *Sheehan.*" Emphases added. *Matz v. DVA,* DE-3443-00-0224-I-1, March 27, 2002

In the instant case the agency has not met its burden of proof under *Sheehan.* <Appellants Exhibit A, pg 2&3>

2. On three (3) occasions <Exhabit A, 3a,b,c,d> CCAD stated unequivocally that AP was NOT entitled to be considered from both the external and internal lists.

"However, the agency has failed to make reference to any law, rule, or regulation that stands in support of its argument. ...Notwithstanding the agency's policy, I find that it is not in accordance with veterans preference rights." *Patterson v. OPM,* PH-3443-03-0223-I-2, December 4, 2003

"In addition, because the Board found that but for his veteran's status...the Board concluded that the Agency took its action against this

appellant because of his military service." *Patterson v. OPM,* 05-3234 (Fed. Cir.), February 15, 2006.

3. Failure of minimum due process, CCAD passed over the appellant several times without a waiver. CCAD CPO/Internal Hiring Unit violated Appellants veteran preference rights at 5 U.S.C. 3318 by passing him over in favor of non-veterans on the 2nd and 3rd (multiple) referral certificates thereby nullifying appellants veterans preference.

"The administrative judge...held that DVA violated the appellant's veterans' preference rights at 5 U.S.C. § 3318 by "passing [her] over" in favor of non-veterans without seeking and obtaining OPM's approval."

"He further held that DVA's "practice of issuing multiple certificates"...had the effect of "nullif[ying]" the appellant's veterans' preference. By way of relief, the administrative judge ordered DVA to appoint the appellant retroactive to the date she would have entered on duty had she been selected, to provide her with back pay, and to pay her an additional sum as damages." *Augustine,* 2001/2003

OTHER RELATED CITES:

The record clearly documents, with the added 5 points the Agencies conclusion would have been different and the Agencies decision may not be sustained.

On remand the AJ stated "...the appellant's status as a veteran was not considered as a part of the selection process. ...reconstruction of all selection actions...for which military service was not considered." *Williams v. United States Agency for Intl Dev.*, AT0330040226-I-1, AT0330040227-I-1 (Apr. 12, 2004).

"We ORDER the agency to reconstruct the hiring..." *Dean v. Department of Agriculture*, AT-0330-03-0076-I-1, August 5, 2005.

"...when it selected three non-veterans ...REVERSE ...ORDER the agency to reconstruct the selection process." *Deems v. Department of the Treasury,* PH-3443-03-0115-I-3, September 7, 2005. *Olson v. Department of Veterans Affairs.* 5 U.S.C. 7701(c)(2)(A) and 5 U.S.C. 2302(b)(11), a prohibited personnel practice.

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Smith v. SSA 2006 MSPB 15, CH-3443-04-0023-I-1, Feb 9, 2006

SUM/SUM

The Petitioner a 79 year old veteran of three wars was hung out to dry by the very service which he served, the Department of the Army. The actions and inactions documented here in the recruiting, ranking and selection had only one objective, and that was the denial of the Petitioner's veterans preference, how despicable can one agency get?

REMEDY

The DEU and Internal ranking rules, procedures and certificates are on par by law and equally quantifiable by rule for the four jobs at issue(DEU 100 = CCAD 300).

Make whole per Augustine.

Make whole per *Patterson*, the AJ and the Federal Circuit stated that, "There is no evidence of record indicating that the appellant's entitlement to the position was superior to that of the person appointed." *Patterson* v. *OPM*, Federal Circuit, February 15, 2006.

In the instant case there are several superior entitlements of record when broadly and liberally construed in accordance with USERRA's mandate that meet, the evidence of record qualification at *Patterson*:

1. The Petitioners ranking on the DEU referral certificate was 105, clearly superior to all selectees for the four jobs at issue. <Appellants Exhibit A, 2a>

2. Petitioners Qualifications were clearly superior to all selectees. Appellants exhibit "A" September 25, 2006, pages 6-10 brief under Qualifications.

3. Petitioners ranking out of the CCAD Human Resources Office, was Best Qualified(2nd referral certificate) + 5 points, clearly superior to all selectees. <Exhibit A, 2b>

4. If the Petitioner had not been wrongfully denied an opportunity to proceed to the interview and selection phases of this process, logically he would have been on a level with Mr. Cass (300 on the 3rd referral list Tab 4a-052) #2 on the DEU referral list <Exhibit A, 2a> after the Petitioner. A reasonable factfinder must concede that as a minimum, with a high degree of certainty, given the record as a whole, Petitioner would have scored higher than Hernandez's (260). Petitioner's qualifications for the jobs at issue were clearly superior to Hernandez. On the DEU referral list Hernandez would, by comparison been at the 86% point, of course the appellant was ranked at 105%. Hernandez's ranking was so low that his name would not have been on the external DEU certificate at all because the cutoff score was 98.0%. See Exhibit A, 2a

The foregoing 4 facts all illustrate, unchallenged by CCAD, superior entitlements to the four jobs at issue justifying a make whole remedy all clearly documented in the record. In essence the AJ and the Federal Circuit opined in so many words that if *Patterson* had had superior entitlements (evidence of record), a make whole remedy would have been proper per *Patterson's* claim.

Respectfully Submitted,

/S/
Milo D. Burroughs, Petitioner, pro se

TESTIMONY OF
JOSEPH C. SHARPE, JR., DEPUTY DIRECTOR
NATIONAL ECONOMIC COMMISSION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ON
VETERANS' PREFERENCE WITHIN THE FEDERAL GOVERNMENT

MARCH 30, 2006

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates this opportunity to share its views on veterans' preference in the Federal government.

Congress enacted the Veterans' Preference Act of 1944 to address the readjustment needs of the men and women who served their country during a time of war. The law was designed to assist veterans in regaining the lost ground suffered in their civilian careers as a result of military service.

When The American Legion was founded in 1919, one of its first mandates was to convert the existing patchwork of veterans' preference laws, administrative rules and executive orders into one national policy that would be protected by law. That goal was realized 25 years later when President Roosevelt signed the Veterans' Preference Act of 1944 into law.

With the closing of World War II the Federal government enthusiastically complied with the provisions of the new veterans' preference law. Unfortunately, as time passed and the memory of war faded, so did America's concern for fulfilling its obligation to its citizen-soldiers. Today, provisions of the original legislation and its amendments, as codified in Title 5, United States Code (USC), seem almost non-existent to many veterans' across the country.

The American Legion believes there are several reasons for this. A large number of Federal managers do not understand or agree with the reasoning for granting veterans' preference to those who fought to keep this country free, nor do they understand or care how this process works. These problems are compounded by the fact that many veterans are unaware and confused regarding their rights under veterans' preference statutes.

The American Legion's National Veterans' Preference Committee recognized the need for better education and published a pamphlet entitled *Questions and Answers About Veterans' Preference*. The purpose of the pamphlet is to not only answer veterans' most commonly asked questions about this entitlement, but to also educate the general public about veterans' preference.

In the early 1970s, veterans' preference became politically controversial. As public opposition to the war in Vietnam escalated, the stigma of the war spilled over to those who served in the armed forces. The American Legion wants to ensure that the current war on terror does not become as unpopular and that negative sentiment does not spill over to those currently serving in the armed forces. The number of veterans complaining of losing jobs, veterans' preference discrimination, homelessness, health care benefits, and other quality-of-life issues are increasing.

During the time of the Vietnam War, affirmative action legislation was enacted that required Federal agencies to establish "goals" and "timetables" for the recruitment of women and minorities for careers in civil service. Because veterans' preference is an earned entitlement and not an affirmative action program, there have never been quotas for the hiring of veterans'. As a result, there is very little incentive for Federal agencies to hire veterans; therefore, choosing to ignore the law.

While The American Legion recognizes the importance of increasing employment opportunities for women and minorities, we are concerned that all too often that goal has been accomplished by denying veterans their rights under veterans' preference laws. Ironically, a large percentage of women and minorities are veterans. In fact, the percentage of minorities serving in the armed forces reflects a larger percentage than the overall percentage of minorities in America.

Under affirmative action, women and minorities are protected from discrimination by the rules and regulations of the Equal Employment Opportunity Commission (EEOC). As a result, those protected by EEOC may file a formal complaint if they feel they have been discriminated against in hiring, promotion or retention. Unfortunately, that same level of EEO protection is not afforded to veterans under veterans' preference even though veterans make up an extremely small percentage of all Americans (less than 10 percent).

While Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans'' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

As a result of the current law, Federal managers who have ignored veterans' preference often times, may not have been held accountable. The weakness in the redress authority must be strengthened.

Office of Personnel Management (OPM)

OPM has a statutory obligation to ensure that agencies abide by statutes providing veterans' preference and we applaud their efforts since 9/11 to promote and protect veterans' preference

throughout the Federal Government. The American Legion has thanked former OPM Director Kay Cole James and current OPM Director, Linda Springer, for efforts to reach out to the veterans' service organizations (VSOs) with invitations to attend OPMs annual meetings, OPM's participation in VSOs' annual conferences and National Conventions, and the veterans' community appreciates these efforts to provide outreach service to veterans and service members stationed around the country. However, The American Legion is still deeply concerned that veterans are not receiving the hiring preference that they rightfully deserve.

With the mandatory downsizing of the Federal government and the implementation of the Flexibility Act, many Federal agencies have become extremely creative in finding ways of circumventing veterans' preference regulations.

Unfortunately, in violation of veterans' preferences statutes, Federal agencies sometimes make appointments by methods that do not require the recognition of veterans' preference. Some of these methods have been approved and endorsed by OPM in the name of "flexibility in hiring." One major focus of The American Legion during the last five years has been to challenge the validity of such appointment methods.

Outstanding Scholar Program

One program that does not require application of preference rules is the Outstanding Scholar Program. In 2001 and 2003, The American Legion filed *amicus* briefs with the Merit Systems Protection Board (MSPB) on behalf of veterans who claimed that the Outstanding Scholar Program violated their preference rights. In the fall of 2005, the MSPB determined that hiring an Outstanding Scholar over a preference eligible was a violation of veterans' preference. (*Dean v. Department of Agriculture*, 99 M.S.P.R. 533 2005) However, OPM, the Federal agency charged with protecting veterans' preference, is asking the MSPB to reconsider this favorable decision. OPM's position is that hiring an Outstanding Scholar is not subject to veterans' preference. The American Legion not only sent a letter to the Director of OPM to reiterate our concern over OPM's filing of a motion for reconsideration in the Dean case, but we are also currently appearing as a friend of the court (*amicus curiae*), arguing that the MSPB decision that found in favor of veterans' preference should prevail.

Several other Federal employment issues were recently decided in favor of veterans. The OPM's Clerical and Administrative Support Positions (CASP) assessment tool, which established a standing register of applicants without regard to veterans' preference, was found to violate veterans' preference rights. (*Deems v. Department of the Treasury, 100* M.S.P.R. 161) The MSPB also decided that although employees are not entitled to veterans' preference in the Merit promotion process an internal applicant for vacancy is entitled to veterans' preference on the same terms as external applicants. (*Perkins v U.S. Postal Service, 100 M.S.P.R.)*

National Security Personnel System

In October 2004, OPM and DoD representatives briefed The American Legion on the National Security Personnel System (NSPS). According to OPM and DoD press releases: "The NSPS represents the most significant change to the civil service since the Civil Service Reform Act of

1978, with flexibilities never before afforded that have the potential to impact the entire Federa work force. These new flexibilities are being married with pillars of the civil service, such a Veterans' Preference, in order to create a new, agile personnel system."

In November 2004, during a special quarterly VSO meeting with OPM representatives, Th American Legion expressed its concerns that deficiencies and flaws in veterans' preference rule in the current Federal personnel system would be continued or magnified in the NSPS. A follow up letter was sent to OPM outlining those concerns. The following is a summary of those concerns with the current personnel system:

> *Veterans' preference laws are intended to give veterans an advantage over other applicants for Federal positions and during a reduction in force (RIF). Veterans earned this advantage by serving their country. For many years, veterans' preference laws successfully provided significant advantages as intended. However, over many years, agencies have gradually gained access to appointment methods that do not require providing preference. Other weaknesses in the current system relate to enforcement of veterans' preference, accountability and disciplinary actions for veterans' preference violations, and the limited appeal rights for violations of veterans' preference.*

The following is a summary of some current problems and a description of how any new personnel system might avoid these problems:

- **Lack of Accountability, Corrective Action and Enforcement of Veterans' Preference Laws**

  Title 5, USC, section 2302 (e) states that no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11) providing that violating veterans' preference requirements is a prohibited personnel practice.

  However, an enforcement mechanism to hold human resource managers accountable for not applying veterans' preference in appointments to the NSPS should be added to NSPS regulations.

  There is a definite need for the creation of disciplinary action under Title 5, USC, section 1215 or a similar statute, should a violation of a veterans' preference prohibited personnel practice occur in the NSPS. Such disciplinary action is available for violations of other prohibited personnel practices.

  The NSPS regulations should also establish an Office of Veterans' Affairs in order to ensure an ongoing, vigilant review of NSPS hiring and RIFs with regard to veterans' preference. The Office of Veterans' Affairs within NSPS should have the power to investigate and prosecute violations of veterans' preference so that there is prompt, appropriate corrective action, such as hiring or other actions, to make a veteran "whole" again.

- **Availability of Appointment Methods not Requiring Application of Veterans' Preference**
  The Outstanding Scholar (OS) Program, allows agencies to ignore veterans' preference in appointments to a wide variety of Federal positions. *See* DELEGATED EXAMINING OPERATIONS HANDBOOK § 2.8 (October 1999) stating that veterans' preference does not apply to the OS program.

  The consent decree upon which the OS Program is based unlawfully exempts a class of individuals from veterans' preference statutes and, in addition, violates Title VII of the Civil Rights Act of 1964, as amended, Title 42, USC section 2000e et seq., which specifically states that nothing in Title VII should be interpreted to repeal or modify a Federal law creating special rights or preference for veterans.

  The American Legion urges that the NSPS rely on hiring tools that require application of veterans' preference and not use any hiring method not requiring the consideration veterans' preference law.

- **Use of Multiple Certificates for a Single Position Weakens "Pass over" Rules**
  Title 5, USC, section 3318(b) protects veterans' preference by requiring a special review process where an appointing authority proposes to *pass over* a preference eligible on a certificate in order to select "an individual who is not a preference eligible." In addition, certain disabled veterans are provided notice and the opportunity to respond to the proposed *pass over*. (*See* Title 5, USC, section 3318(b)(2))

  When this *pass over* law was passed, agencies prepared only a single certificate for each open position. However, over time agencies began to prepare separate certificates for each different hiring flexibility that might be used to fill the position. (As noted earlier, some hiring authorities do not require that veterans' preference be applied; for example, OS does not require that veterans' preference be applied). Agencies began to fill a single position by choosing from among multiple certificates. The use of multiple certificates at the current time means that an appointing authority may *pass over* a preference eligible heading one certificate simply by choosing from another certificate drawn from a hiring authority that does not require application of veterans' preference. This weakens veterans' preference and renders impotent the important section 3318 protections against *pass overs*.

  The NSPS should incorporate important pass over protections into its system. Also the NSPS should not allow the creation of multiple certificates or lists for a single position. NSPS should rank the various hiring flexibilities--flexibilities that require veterans' preference should top the hierarchy of hiring flexibilities.

- **Lack of Hierarchy in Appointment Methods**
  As noted above, a number of hiring flexibilities are available under the current Federal hiring system. If hiring authorities that do not apply veterans' preference continue to exist, The American Legion believes that appointment methods requiring application of veterans' preference should explicitly be favored over other methods and top the

hierarchy of appointment methods. The NSPS should only be able to resort to a lower hiring flexibility in limited cases when there is an absolute necessity.

- **Weakness in the Ability of Veterans' to Appeal Veterans' Preference Violations**
  Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

  The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

Conclusion

The American Legion would like to reiterate how important veterans' preference in Federal hiring is to returning service members and veterans. It is equally important that OPM maintain enforcement power over Federal agencies. In a time of rapid change and with the pending departure of 400,000 service members within the next two years, The American Legion believes that the current structure within OPM that is designed to monitor, inform, promote and enforce veterans' preference laws is clearly inadequate. The American Legion recommends that Congress provide additional funding for an Office of Veterans Affairs within OPM that is adequately staffed and funded. Such an office could better exercise OPM's mandate to protect veterans' preference.

Mr. Chairman, a grateful nation created the concept of veterans' preference for those citizens who served this country in the armed forces. Due to the current War on Terror, thousands of service members of the Reserve component, who make up 40 percent of the current fighting force in Iraq and Afghanistan, will now qualify for veterans' preference due to their extraordinary contribution to the freedoms we all enjoy as Americans. The American Legion urges this Subcommittee to send a strong message to Congress to do more to preserve and protect veterans' preference.

Mr. Chairman, this concludes my statement.